IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-157

ORIGINAL COSMETICS PRODUCTS, INC., and
LOVE SONG COSMETICS CORP.,

Petitioners,

against

JOHN STRACHAN, Postmaster at New York City, New York,
and UNITED STATES POSTAL SERVICE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Original Cosmetics Products, Inc., and Love Song Cosmetics Corp., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit holding that an administrative determination of the Postal Service, that petitioners were engaged in a scheme or device for obtaining moneys through the mails by making false representations in violation of 39 U.S.C. § 3005, is to be upheld merely if there is substantial evidence to support the factual

findings of fact made, in the absence of scientific experimentation which expert medical witnesses for both sides agreed should be performed, and where neither medical expert was able to testify to a reasonable medical certainty.

Opinions Below

The opinion of the United States Court of Appeals has not yet been reported; a copy of its judgment, order and decree is annexed hereto as Appendix A. The opinion of the United States District Court of the Southern District of New York is reported at 459 F.Supp. 496; it is annexed hereto as Appendix B. The following additional opinions, one of which is reported, are also appended hereto as the following respective Appendices: Appendix C, the opinion and recommendation of Postal Service Administrative Law Judge Grant; Appendix D, the opinion and orders of the Judicial Officer of the Postal Service; Appendix E, the opinion of Magistrate Schreiber of the United States District Court for the Southern District of New York, reported at 459 F.Supp. 499.

Jurisdiction

The order, judgment and degree sought to be reviewed was made and entered on April 30, 1979. The statutory provision believed to confer on this Court jurisdiction to review the order in question by writ of certiorari is 28 U.S.C. § 1254(1).

Questions Presented for Review

1. When a federal administrative agency has determined that false advertising representations were made in violation of 39 U.S.C. § 3005, is the appropriate standard of judicial review, consistent wtih the First Amendment to the United States Constitution, whether the evidence to

support the findings is a) substantial, as held below; or b) clear and compelling; or c) proof beyond a reasonable doubt?

2. Are any of these tests met, under all the facts and circumstances of this case, when a) the complainant's sole medical expert admittedly knew nothing about the components of the advertised products, was admittedly biased and prejudiced against them, and never testified as to a reasonable medical certainty; b) he and your petitioners' medical experts agreed that it cannot be told if the advertised products work in the absence of scientific testing; c) money back guarantees were met; and d) in some of the advertisements, every representation was true, even according to the complainant's medical expert?

3. Is the statute, 39 U.S.C. § 3005, facially, and as construed and applied, in violation of the Fourth Admendment to the United States Constitution because it permits the opening of mail without judicial warrant?

4. Is said § 3005 in violation of the First and Fifth Amendments to the United States Constitution, facially, and as construed and applied, because it constitutes a prior restraint upon later truthful advertising of the same products, and is unnecessarily drastic?

Constitutional Provisions and Statutes Involved

First Amendment:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *".

Fourth Amendment:

> "The right of the people to be secure in their * * * papers and effects, against unreasonable searches and seizures, shall not be violated * * *".

Fifth Amendment:

> "No person shall be * * * deprived of * * * liberty, or property, without due process of law * * *".

39 U.S.C. § 3005:

> "False representations; lotteries
>
> (a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, * * * the Postal Service may issue an order which—
>
> (1) directs the postmaster of the post office at which mail arrives, addressed to such person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and
>
> (2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note."

Statement of the Case

The Consumer Protection Service of the United States Postal Service, as complainant, brought a proceeding before a Postal Service Administrative Law Judge claiming that petitioners were engaged in a scheme or device for obtaining moneys through the mails by making false representations in violation of 39 U.S.C. § 3005. Petitioner Original had disseminated a brochure noting that it was selling items as novelties only (23a)*, being "LEGENDARY APHRODISIACS WITH THE PLACEBO QUALITIES DOCTORS HAVE USED FOR YEARS". Petitioner Love Song's brochure, attacked in the Administrative Complaint, made no reference to aphrodisiacs (25a). The Consumer Protection Service charged that certain products in both brochures were advertised falsely as aphrodisiacs.

* Such references are to the Joint Appendix filed below.

The Government's expert witness, Dr. Hotchkiss, admitted bias against the products involved (293a-294a).[1] He further agreed that the efficacy of the ingredients of your petitioners' products could not be properly established without double-blind testing, including experiments with a placebo, in which the experimentor himself does not know which product is the placebo, because the experimentor might be biased (292a-293a).[2] He further testified that

[1] "Q. And, sir, when did you agree to testify for the Government in this case?
A. On Friday the 13th.
Q. The same day you were asked?
A. Yes.
Q. Don't you think you might be a little biased and leaning toward a conclusion with respect to the items here?

• • •

A. Yes. I think it is possible that I think these drugs are worthless. I think they are being pushed on the public who is paying for them and I am biased about them. But I am trying to balance any bias that I may have on the honesty of the answering of your questions.
Q. I can appreciate that, sir. But this was all without any experimentation whatsoever?
A. Yes."

[2] "Q. * * * Anyhow, the point is, before you can judge the effect of the drug, you should really have experimentation of it, isn't that the point, with placebos and controls?
A. You say that anybody should know when they are getting a drug whether—again, I would like to—
A. Let me start again. * * *
Before one can really judge the effectiveness of a drug or a compound, there should be medical experimentation where there should even be the double-blind test where the doctor does not know what is the placebo and what is not the placebo?
A. That is how they desire it, yes.
Q. And that is because the doctor might be biased and leaning towards a conclusion of the worth of the drug; correct?
A. Yes."

". . . no one, no physician knows anything about" the ingredients of the products involved (277a).

No experimentation whatsoever had been done to determine whether the items had value as aphrodisiacs (137a), and only within the last decade did science have available techniques to study such substances (167a-169a).

The complainant's expert witness, Dr. Hotchkiss, admitted that every single statement in one of the advertisements, for Ginseng, was correct (268a-270a). He further admitted that no false representation had been made in the advertisement for Turnera Aphrodisiaca Caps (244a-245a). He gave only his opinion as to whether the products would work for their advertised purpose; he at no time testified as to a reasonable medical certainty.

Your petitioners' expert witness, Dr. Davis, was unable to give his opinion as to whether the products worked, in the absence of experimentation. He did testify, however, that one product containing Serenoa Serrulata (Jungle Passion Caps), and several containing Rufous Capsicum Annum (red pepper) would have an aphrodisiacal effect because they are mild irritants to the lining of the urinary tract, and, according to Masters and Johnson's "Human Sexual Response", irritation of the urinary tract will have an aphrodisiacal effect (134a-136a, 126a, 129a-130a, 134a-135a, 140a).

Dr. Hotchkiss, the complainant's expert witness, was entirely unfamiliar with the medical literature re aphrodisiac qualities of irritants to the urinary tract (231a.).

The Administrative Law Judge ruled that the advertising for all products contained false representations, and recommended an order preventing the products from being sold. (App. C pp. 11a-27a). The Acting Judicial Officer of the Postal Service affirmed (App. D 28a-40a).

The basis for federal jurisdiction in the court of the first instance, the United States District Court for the

Southern District of New York, was 28 U.S.C. § 1339. In said court, Magistrate Schreiber recommended the granting of the motion of defendants (respondents here) for summary judgment. Though the Magistrate, to determine what representations had been made by petitioners had combined not only the two brochures of petitioners which were attacked in the complaint, but also a totally separable brochure of one of petitioners' [*infra*, 49a], nowhere mentioned in the complaint, the District Court, pursuant to 21 U.S.C. § 636(b)(i), concluded that the Magistrate had applied an appropriate standard for review, *i.e.*, whether substantial evidence existed to support the findings.

An appeal was taken to the United States Court of Appeals for the Second Circuit, which affirmed the judgment of the District Court substantially on the basis of the District Court's decision.

This petition is to review the Second Circuit order, judgment and decree affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. In ruling that the judicial review standard in postal false representation cases is substantial evidence, the Court below decided an important federal and Constitutional question which has not been, but should be, settled by this Court—and decided it, moreover, in a way in conflict with the applicable decision of this Court.

In *Reilly* v. *Pinkus*, 338 U.S. 269, 277 (1949), this Court held that since, in a postal fraud case, the Postmaster General may bar an offender from using the mails and thus wholly destroy a business, postal orders must be limited "to instances where actual fraud is *clearly proved*." (Emphasis supplied.) Since the same bar operates in 3005

cases, this case was decided below in a way in conflict with *Reilly*. Moreover, Reilly was decided before this Court extended free speech protection to commercial advertising [*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)]; hence, since the administrative agency now determines whether advertising constitutes free speech or falsity, a strict standard proof must be required lest free speech be the victim of an agency determination. And free speech may be abridged, under the decision below, without clear proof, even though the alleged misrepresentation is made in total innocence, since 3005 does not require any proof of wilful misrepresentation before the Postal bar operates.

In any event, as is apparent from the decision below, this Court has never determined the standard of judicial review in 3005 cases. Decision of such issue is particularly important in the light of this Court's recent rulings in *Addington* v. *Texas*, —— U.S. —— (1979) and *Jackson* v. *Virginia*, —— U.S. —— (1979).

In *Addington*, this Court held that in civil commitment cases, where the court operates for a non-punitive purpose, clear and convincing evidence—usually required "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing"—must be found. Since 3005 operates in a punitive and quasi-criminal fashion—by putting the mailer out of business, depriving him of receipt of monies earned by previously placed advertisements, and by preventing even truthful later advertisements for the products involved,—surely the "clear and convincing test" should be applicable, at a minimum, to 3005 cases.

Since the consequences of a 3005 order may indeed be more severe than those of a state criminal conviction, we urge that the standard of judicial review should be whether there was proof beyond a reasonable doubt. Surely, deprivation of the mailer's free speech should not be countenanced in the absence of proof beyond a reasonable doubt of the speech's falsity. Unless somehow free speech is to be less protected than freedom from incarceration for a crime, the proof beyond a reasonable doubt standard must be employed.

Jackson held that in federal habeas corpus review of a state conviction, the applicant wins "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." In a federal court's review of a federal administrative agency's determination that advertising was false and hence not protected by the First Amendment, the applicable standard, freed from the constraints of the federal-state relationship, and protective of a Constitutional right, should be at a minimum the *Jackson* test,—and, indeed, the reviewing court should require proof beyond a reasonable doubt.

The substantial evidence test, the usual standard for reviewing findings of facts in purely civil cases between private parties, should not be applied in appellate adjudications of constitutional rights with quasi-criminal consequences. Neither abridgments of constitutional rights nor imposition of quasi-criminal penalties should be allowed to turn on the preponderance of evidence before an administrative tribunal, judicially reviewable only to determine whether there was substantial evidence.

II. Under any of the tests of judicial review, the banning of your petitioners' advertising was in conflict with applicable decisions of this Court, and should be reversed.

In *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902), this Court ruled that mere medical opinion evidence may not be the basis of a finding of false advertising. Recently, this Court has noted in *Addington* v.

Texas, supra, that "Within the medical discipline, the traditional standard for 'factfinding' is a 'reasonable medical certainty' ". Yet the complainant's expert witness gave only his mere opinion—and, significantly, never as to a "reasonable medical certainty".

Now that advertising is protected by the First Amendment, it is all the more important that the advertiser be protected against mere medical opinion, especially as we now learn each day that yesterday's medical gospel is today's medical heresy. In the case at bar, the finding of false advertising cannot be upheld under any test of judicial review, since the sole medical expert for the complainant a) gave only his naked opinion, b) never as to a reasonable medical certainty, c) as to products about whose ingredients he admitted no physician knows anything, d) which he himself testified should be subjected to double-blind experimentation because the experimentor might be biased against the product, and as to which products e) he himself was admittedly biased.

Moreover, even the complainant's witness admitted that all advertising representations for two of the products were true. And, he was totally unfamiliar with the widely known work of Masters & Johnson, which showed, according to the testimony of petitioners' expert witness (never contradicted) that most of the products would have an aphrodisiacal effect.

We further note that the Magistrate's combining the brochures of both petitioners, attached to the complaint, together with a third brochure never the subject of any, charge, was a violation of due process. Indeed, only the other day this Court reiterated that "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole* v. *Arkansas*, 333 U.S. 196, 201; *Presnell* v. *Georgia*, ——U.S. ——." *Jackson* v. *Virginia, supra.* Yet the findings against your petitioners are based not on reading each of the attached

brochures of each petitioner separately to determine what each brochure represents, as the administrative complaint charged. Instead, both brochures together with a third that was never the subject of any charge, were all read together. Thus, the finding of a 3005 violation was made in violation of axiomatic due process. It cannot properly stand under any judicial review.

III. In ruling 3005 constitutional though it permits opening of mail without judiical warrant, the Court below decided a federal question in a way directly in confiict with prior decisions of this Court.

Under 39 U.S.C. § 3005, the local Postmaster, in the event of a finding adverse to the mailer, is necessarily required to open the mail addressed to the advertiser to determine whether it is in response to an allegedly false representation. Such opening is made without judicial warrant. Indeed, the administrative order issued herein (App. D, pp. 35a-6a) requires the Postmaster to satisfy himself that the customer's mail is not related to the products advertised falsely, which obviously cannot be done without the mail being opened.

Since mail addressed to the advertiser from its customers may be opened without judicial warrant, the decision below is in conflict with the decisions of this Court holding that the Fourth Amendment prohibits the opening of mail matter without a judicial warrant. *United States* v. *Chadwick*, 433 U.S. 1 (1977); *Ex Parte Jackson*, 96 U.S. 727, 733(1878).

Of course, the advertisers may assert such privacy rights of their customers. *Craig* v. *Boren*, 429 U.S. 190 (1976); *Carey* v. *Population Services Intern.*, 431 U.S. 678 (1977). Since the customers involved are seeking relief from sexual inadequacies, the violations of their rights are peculiarly egregious here.

Curiously, the Second Circuit ignored this point, though it was raised in the District Court (109a-110a), and reiterated upon appeal.

IV. The constitutionality of 3005, as against claims of due process and free speech violations, has not been determined by this Court. Thus the Court below decided an important question of federal law which has not been, but should be, settled by this Court.

This Court did not decide in *Reilly* v. *Pinkus, supra,* whether due process and First Amendment rights were violated by 3005, since neither question was raised therein. Indeed, since *Reilly* antedated by more than a quarter of a century this Court's decision in *Virginia State Board of Pharmacy, supra, Reilly* could not have considered whether the statute violated the First Amendment.

Nor, indeed, was there any foreclosure of our points by this Court's decision in *Lynch* v. *Blount,* 330 F. Supp. 689 (S.D.N.Y. 1971) (three judge Court), *aff'd,* 404 U.S. 1007 (1972). For the only attack upon the statute in *Lynch* was based upon the contention that somehow there was a taking without due process of law, illegal under *Reilly* (a point we have never raised), and that the situation was identical to that of an obscenity stop order, held unconstitutional in *Blount* v. *Rizzi,* 400 U.S. 410 (1971). Quite apart from the fact that this case does demonstrate that at least in the area of sexual advertising, there is as fine a line between the truthful and the false as between free speech and obscenity, *Lynch* was decided prior to this Court's determination that truthful advertising was protected by the First Amendment. Moreover, there was no contention in *Lynch* as to the overbreadth of the statutory remedy.

We have basically four Constitutional objections to 3005's validity, none of which were raised in *Lynch* or *Reilly.* To elucidate:

1. The 3005 remedy is not merely a cease and desist order, stopping the representations found false. Instead, it prohibits all further advertising of the products involved, including truthful advertising. The statute thus conflicts with *Virginia State, supra,* by preventing truthful commercial advertising (App. D, 37a, *infra*).

2. By preventing such truthful advertising in advance, an unconstitutional prior restraint is imposed. *DeJonge* v. *Oregon,* 299 U.S. 353 (1937).

3. Section 3005 is not directed against fraudulent advertising, as its predecessors had been. Thus, advertising which is not intentionally false, but only negligently false, may be prohibited by 3005. But this Court has held that negligent speech may not be penalized. *Time, Inc.* v. *Hill,* 385 U.S. 374, 389 (1967).

4. The unnecessarily drastic remedies of the statute—mail and money impounding, opening of customers' mail, notification of misdoing to all of the advertiser's customers, and prohibition of all further advertising of the products involved—when the narrower remedy of a cease and desist order would cure the evil of false advertising, violates the First and Fifth Amendments. *Shelton* v. *Tucker,* 364 U.S. 479 (1960). And other Federal Courts of Appeal have recently held that overbroad restrictions of commercial advertising violates the First Amendment. *Beneficial Corp.* v. *F.T.C.,* 542 F. 2d 611, 618-20 (3d Cir., 1976); *National Com'n on Egg Nutrition* v. *F.T.C.,* 570 F. 2d 157, 164 (7th Cir., 1977).

A further difficult question arises from the Second Circuit's construction of the statute holding that 3005 applies to an advertisement which does not make an express misrepresentation but which "is artfully designed to mislead those responding to it * * *." Surely, artfully misleading

speech in the political arena could never be prohibited consistent with the First Amendment. Query, whether commercial advertising, also protected by the First Amendment, may now be prohibited because it is found misleading by the trier of the facts.

CONCLUSION

This petition for certiorari should be granted, and the decision below reversed.

Dated: New York, New York
July 30, 1979

Respectfully submitted,

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APPENDIX A

Order, Judgment and Decree of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Thirtieth day of April, one thousand nine hundred and seventy-nine.
Present:

HONORABLE J. JOSEPH SMITH

HONORABLE THOMAS J. MESKILL,
Circuit Judges,

HONORABLE CHARLES S. HAIGHT, JR.,
District Judge*

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* Honorable Charles S. Haight, Jr., of the United States District Court for the Southern District of New York, sitting by designation.

ORIGINAL COSMETICS PRODUCTS, INC., and
LOVE SONG COSMETICS CORP.,
Plaintiffs-Appellants,

v.

JOHN STRACHAN, Postmaster at New York City, New York and UNITED STATES POSTAL SERVICE,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Order and Judgment of the United States Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

This is an appeal from a judgment entered in the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge,* granting summary judgment in favor of the Postmaster of New York and the United States Postal Service. The district court upheld the administrative determination of the Postal Service that Original Cosmetics Products, Inc. and Love Song Cosmetics Corp. were engaged in a scheme or device for obtaining money through the mails by means of false representations in violation of 39 U.S.C. § 3005, and also upheld the issuance of an administrative order prohibiting the delivery of mail to, and the payment of Postal Service money orders made out in favor of, the above-mentioned corporations if such mail or money orders were related to the scheme. The judgment of the district court is affirmed, substantially on the basis of the district court's opinion, which in turn was substantially based on the recommendation of United States Magistrate Sol Schreiber.

The constitutionality of 39 U.S.C. § 3005, the procedures here employed, and the remedies here instituted cannot be doubted. *See Lynch* v. *Blount,* 330 F.Supp. 689 (S.D.N.Y. 1971) (three judge court), *aff'd,* 404 U.S. 1007 (1972). *See also United States* v. *Outpost Development Corp.,* 369 F. Supp. 399 (D.C. Cal.) (three judge court), *aff'd,* 414 U.S. 1105 (1973). The recent Supreme Court decision of *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976), does not require a contrary result. *See* 425 U.S. at 771: "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *See also Friedman* v. *Rogers,* 47 U.S.L.W.

Appendix A—Order and Judgment of the United States Court of Appeals for the Second Circuit.

4151, 4153-54 (U.S. Feb. 21, 1979). That the corporations' Due Process and First Amendment rights were not violated is made clear by *Reilly* v. *Pinkus,* 338 U.S. 269 (1949).

When federal courts are asked to review a Postal Service decision such as the one made here the standard of review is as follows:

> [E]ven though the court, as the original trier of facts, might have reached a different conclusion, it may not substitute its own judgment if there is substantial evidence to support the findings of fact made. . . .
>
> Thus the court's power to upset a finding by the [Postal Service] that the mails are being used in furtherance of a fraudulent scheme is restricted to those instances where there is not substantial evidence reasonably to support [its] conclusion.

N. Van Dyne Advertising Agency, Inc. v. *United States Postal Service,* 371 F. Supp. 1373 (S.D.N.Y. 1974) (Weinfeld, *J.*). We are satisfied that this test has been met by the government. *See also Gottlieb* v. *Schaffer,* 141 F.Supp. 7, 14-16 (S.D.N.Y. 1956) (Weinfeld, *J.*). As explained by then District Judge Kaufman:

> It is no defense that specific isolated portions of the advertisements might have been true.
>
> It is not each separate word or a clause here and there of an advertisement which determines its force, but the totality of its contents and impression of the entire advertisement upon the general populace.
>
> [E]ven if an advertisement is so worded as not to make an express misrepresentation, nevertheless, if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable.

Borg-Johnson Electronics, Inc. v. *Christenberry,* 169 F. Supp. 746, 751 (S.D.N.Y. 1959).

Appellants contend that, in the absenct of scientific experiments demonstrating the lack of effectiveness of their products, there is a fatal insufficiency of proof that the adverising claims were false. However, *Reilly* v. *Pinkus, supra,* specifically rejected the contention that "even the testimony of the most experienced medical experts can never rise above a mere 'opinion' unless the expert has made actual tests of the drug to determine its effects in relation to the particular representations alleged to be false." 338 U.S. at 274. Thus in a given case the necessity of actual tests becomes a part of the determination committed by the statute to the Postal Service. Where "two widely held schools of opinion" exist in a field "where knowledge has not yet been crystallized in the crucible of experience," *Reilly, supra,* at 273, 274, interpreting *American School of Healing* v. *McAnnulty,* 187 U.S. 94 (1902), the law may require tests as a foundation for medical opinion. But medical opinion is sufficient to demonstrate "not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, so that by so advertising it he was perpetrating a fraud upon the public." *Leach* v. *Carlile,* 258 U.S. 138 (1922) (advertisement of "Organo Tablets" held false which proclaimed their ability to alleviate "nervous weakness, general debility, sexual decline or weakened manhood and urinary disorders.") *Reilly* v. *Pinkus* dispensed with the necessity of tests in respect of advertising which claimed that half a teaspoonful of granulated seaweed a day would cause weight loss. Judged by these criteria, there is no basis in the case at bar to invalidate the

Postal Service's findings because of an absence of actual tests.

We can in no way say that the Postal Service abused its discretion in refusing to reopen the hearing to permit further testimony. *See Greene County Planning Board* v. *FPC,* 559 F.2d 1227, 1223 (2d Cir. 1976), *modified en banc on other grounds,* 559 F.2d 1237 (2d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978).

As explained by the district court in its memorandum decision, "[i]t is entirely fitting that governmental action which has consequences as drastic as those which flow from a Post Office stop order and which could potentially impinge upon First Amendment rights be subject to careful scrutiny." The district judge found that the appellants' contentions had "received full and fair consideration both administratively and before the Magistrate." It is our judgment that the appellants' arguments received similar treatment from the district judge.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of the district court is affirmed.

J. Joseph Smith
J. Joseph Smith, U.S.C.J.

Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

Charles S. Haight, Jr.
Charles S. Haight, Jr., U.S.D.J.

APPENDIX B

Memorandum and Order of United States District Court, Southern District of New York.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM and ORDER
76 CIV 4111 (LBS)

ORIGINAL COSMETICS PRODUCTS, INC. and
LOVE SONG COSMETIC CORP.,

Plaintiffs,

—against—

JOHN STRACHAN, Postmaster at New York City, New York, and UNITED STATES POSTAL SERVICE,

Defendants.

SAND, D.J.

Pursuant to 28 U.S.C. Section 636(b)(i), this Court is called upon to "make a de novo determination of the report or specified proposed findings or recommendations to which objection is made" with respect to the recommendations of Magistrate Sol Schreiber that defendants' motion for summary judgment be granted.

As set forth in detail in the Magistrate's Recommendation (attached hereto), in November, 1975, the Postal Service instituted an administrative proceeding charging that plaintiffs' advertising was materially false for the following products:

> Song of Passion Tablets, Super Ginseng Tablets, Spanish Fly Imitation, Ginseng and Imitation Spanish Fly, Jungle Passion Caps, All American Booster Caps with Vit. E, Authentic Turnera Aphrodisiaca Caps, Drive Her Wild, and Instant Erection Oil.

An administrative decision found that the plaintiffs have been engaged in a scheme to obtain money through the mails by means of false representations in violation of 39 U.S.C. Section 3005. An Order was issued prohibiting delivery of mail to, and payment of Postal Money Orders in favor of, plaintiffs with respect to the above products.

Plaintiffs appealed unsuccessfully from the decision of the administrative law judge to the Judicial Officer of the Postal Service and, having thus exhausted their administrative remedies, commenced this action. Both parties moved for summary judgment, Fed. R. Civ. P. 56; by Order dated September 23, 1977 of the Honorable Gerard L. Goettel, District Judge (from whom this case was reassigned to the undersigned), the case was referred to Magistrate Schreiber for the purposes of reviewing the administrative record and submitting a report and recommended disposition. On April 25, 1978, after a comprehensive review of the issues presented, Magistrate Schreiber recommended the granting of defendants' motion for summary judgment.

Plaintiffs thereafter filed a thirty-eight page memorandum in opposition to the Magistrate's Recommendation which they describe as "an informal comment rather than a formal brief . . . because we believe it will suit the convenience of the Court, we herein avoid the conventional approach of setting forth the facts and then the legal arguments, but, as does the Magistrate, bunch together the recitation of the evidence and legal argument in regard thereto". (Plaintiffs' Comments, p. 1).

This format lends itself to a somewhat discursive but not uninteresting dissertation on sexuality, aphrodisiacs and placebos. However, after a thorough review of the entire

Appendix B—Memorandum and Order of United States District Court, Southern District of New York.

record, the Magistrate's Recommendation and the memoranda submitted by the parties, we conclude that none of plaintiffs' objections have merit.

Plaintiffs begin their contentions by conceding that "the learned Magistrate accurately sets forth the procedural posture and background of this case. Were the facts and issues as stated by the Magistrate, it would be difficult to quarrel with his recommendation. But neither our contentions, the law, nor the facts are as the Magistrate suggests we urged them to be, nor as he finds them to be." (Plaintiffs' Comments, p. 1). We, therefore, examine plaintiffs' specific points to see whether this characterization is sound.

First, plaintiffs urge that the Magistrate dealt only with the issue of facial constitutionality, whereas plaintiffs urged the unconstitutionality of the statute "*as construed and applied*" (emphasis in original). (Plaintiffs' Comments, p. 2). But upon analysis, this contention turns out to be nothing more than a semantic variation of plaintiffs' prime argument that the remedy provisions of 39 U.S.C. Section 3005 are unconstitutional. Plaintiffs base their argument on the Supreme Court's holding in *Blount* v. *Rizzi*, 400 U.S. 410 (1971), that parallel administrative procedures contained in 39 U.S.C. Section 4006, which deals with obscenity, were unconstitutional.

This contention, however, is foreclosed by *Lynch* v. *Blount*, 330 F.Supp. 689, 694 (S.D.N.Y.) aff'd 404 U.S. 1007 (1971), where Judge Medina explicitly held:

> "We think the safeguards defined in *Blount* v. *Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed 2d 498 (1971), for obscenity cases are wholly inappropriate, unnecessary and inapplicable to the field of commercial fraud."

Plaintifls seek to avoid the impact of *Lynch* on two grounds. First, that *Virginia State Board of Pharmacy* v.

Appendix B—Memorandum and Order of United States District Court, Southern District of New York.

Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), holding certain commercial advertising protected by the First Amendment, opens to question the continued validity of *Lynch*. But, as the Magistrate noted, in *Virginia State*, the Supreme Court went to some lengths to make clear its view that the First Amendment does not prohibit the State from dealing with deceptive or misleading advertising. 425 U.S. at 770-72.

Second, in its Reply Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, plaintiffs' seek to distinguish *Lynch* on the grounds that the court there was dealing with "good old-fashioned schemes to defraud" which are "easily recognized". 330 F.Supp. at 695. Plaintiffs urge that when one deals in the area of human sexuality, where the state of our knowledge is far from complete and where new research is being conducted producing new insights and attitudes, different principles should obtain. The Court finds little basis to quarrel with plaintiffs' philosophic discussions concerning the inadvisability of dogmatism with regard to sexuality, but we do find it difficult to distinguish cases dealing with "good old-fashioned schemes to defraud" with the instant case where plaintiff, among other things, sold common variety red pepper as "Imitation Spanish Fly" for $5.95 per 24 tablet bottle.

We have examined all of plaintiffs' other contentions. Many of them seemingly put forth as separate objections are but variations on plaintiffs' principal themes; others are "quibbles" which either fail to undermine the basic soundness of the Magistrate's conclusions or lack support based on a fair reading of the record.

We have concluded that the Magistrate applied the appropriate standards for review of the administrative decision under challenge and correctly interpreted the applicable law.

Appendix B—Memorandum and Order of United States District Court, Southern District of New York.

It is entirely fitting that governmental action which has consequences as drastic as those which flow from a Post Office stop order and which could potentially impinge upon First Amendment rights be subject to careful scrutiny. We are satisfied that plaintiffs' contentions received full and fair consideration both administratively and before the Magistrate.

The Magistrate's Recommendation is accepted by this Court and summary judgment is granted in favor of defendant.

So ordered.

Dated: New York, New York
July 12, 1978

Leonard B. Sand
U.S.D.J.

APPENDIX C

Decision of Administrative Law Judge.

(seal)

OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D. C. 20260

P.S. Docket No. 4/120

In the Matter of the Complaint Against

Original Cosmetic Products, Inc.
P.O. Box 480
and
Love Song Cosmetic Corp.
P.O. Box F
at
New York, New York 10011

and

Love Song Cosmetics
P.O. Box 498 Cooper Station
at
New York, New York 10003

H. Richard Hefner, Esq., Law Department, United States Postal Service, Washington, D.C., for Complainant

Herbert Monte Levy, Esq., New York, New York, for Respondents

Before: Quentin E. Grant, Administrative Law Judge

INITIAL DECISION

Complainant alleges that respondents are engaged in conducting a scheme or device for obtaining money or property through the mails by false representations in violation of 39 U.S.C. §3005. The proceeding involves nine products described hereinafter in detail.

The complaint alleges that respondents attract attention to these products by means of advertising matter containing false representations calculated and intended to induce readers therof to remit to respondents money or property for the product through the mails.

The complaint further alleges that by means of such advertising matter, respondents expressly and impliedly represent to the public in substance and effect:

"(a) SONG OF PASSION TABLETS are an effective aphrodisiac or sexual stimulant. (e.g., 'Song of Passion is a unique blend of aphrodisiacs . . .,' 'It is one of the best so-called aphrodisiacs for a satisfying marital relation that can be found anywhere.' etc.)

"(b) SUPER GINSENG TABLETS are an effective means of increasing and prolonging sexual virility and potency. (e.g., 'It has been used by the Orientals for over 5,000 years to increase sexual virility and prolong life and potency. Indeed, if one is to believe all the legendary writing on this exotic herb, it then can indeed be called "The Root of Virility".' etc.)

"(c) SPANISH FLY IMITATION is an effective aphrodisiac or sexual stimulant for men and women. (e.g., 'Our Spanish Fly Imitation is a special blend of exotic oriental spices designed to create a mild irritation of the urinary tract. Upon passage thru the body tiny particles of this genuine imported spice effectively and

safely stimulate the sexual organs in both the male and female and has the potential to produce real excitement.' etc.)

"(d) GINSENG AND IMITATION SPANISH FLY is an effective means of heightening and prolonging sexual performance, capacity and enjoyment. (e.g., 'The Chinese have used [ginseng] as an aphrodisiac for over 5,000 years.' 'Legendary writings say Ginseng is highly effective in awakening and producing sexual desires in men and women alike. We have added our imitation Spanish Fly to the Ginseng to make it work faster and longer.' 'Ginseng is sometimes called "The Turn-on Root". To quote S. Steingold ". . . if you think you have been turned on before you ain't seen nothing yet". Try our Ginseng with Spanish Fly Capsules and find out what he means.' etc.)

"(e) JUNGLE PASSION CAPS are an effective aphrodisiac or sexual stimulant. (e.g., '. . . designed to bring out the 'Beast in You'. Students of aphrodisiacs could write volumes about this product. Try it and write your own testimonial,' etc.)

"(f) ALL AMERICAN BOOSTER TABS WITH VITAMIN E are an effective means of increasing sexual virility and performance. (e.g., 'NOW!! EXCITING NEW ITEMS FOR A MORE ABLE AND DESIRABLE YOU,' '. . . it will work even better than our old formula to do the job you want it to.' '. . . or are [you] just feeling tired and sluggish when you should be roaring like a lion—this product may be just for you.' etc.). (As amended pursuant to stipulation (Tr. 131).

"(g) AUTHENTIC TURNERA APHRODISIACA CAPS are an effective aphrodisiac or sexual stimulant. (e.g. '. . . designed to react upon the body in approxi-

mately 1 hour. The name Turnera Aphrodisiaca stands on its own.' 'MORE LEGENDARY APHRODISIACS WITH THE PLACEBO QUALITIES DOCTORS HAVE USED FOR YEARS!!' etc.)

"(h) DRIVE HER WILD with heighten sexual enjoyment and cause women to engage in sexual intercourse who were previously too frigid to do so. (e.g. 'This new and amazing product is for women who are having sexual relations and not getting the utmost enjoyment that sex can give you.' 'It will also help those who are contemplating sexual relations but are too frigid to try.' '. . . when applied to the nipples or clitoris will stimulate and sensitize them arousing your sexual desires and helping you get the utmost enjoyment from sex.' etc.)

"(i) INSTANT ERECTION OIL will instantly and for a prolonged period of time enable a man who cannot otherwise do so to achieve an erection. (e.g., 'scientifically formulated to help you get an instant erection when rubbed on the head of the penis.' '. . . it causes a flow of blood to rush into the penis, giving you an instant erection.' '. . . it should cause the penis, to get harder and larger for a prolonged period of time.' '. . . this new and amazing product is for men who have tried everything else and have had no luck. No longer need you let the best of joys that life has to offer pass you by. With this fantastic product you too can now stand up and be counted.' etc.)

Finally, the complaint alleges that the representations alleged are materially false as a matter of fact.

The answer filed by respondents denies the allegations of the complaint except for an admission as to the dissemination of the advertisements annexed to the complaint.

A hearing was held in New York City and Washington,

D. C., at which the parties introduced evidence and thereafter submitted proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent uses the mail to disseminate the advertising matter involved in this proceeding. Such advertising matter is calculated and intended to induce readers thereof to remit money or property through the mails for the products as advertised. (Tr. 3; Resp. Proposed finding no. 1.)

2. I find that the products involved in this proceeding contain the quantities of active ingredients listed below (Stip. Joint Ex. 1):

a. *Love Song Song of Passion Tablets:*

a) 26 mgs Passiflora (a/k/a Passion Flower)
b) 1% Rufous Capsicum Annum (a/k/a Red Pepper)

b. *Love Song Super Ginseng:*
Powdered extract of ginseng 3:1—10 mgs

c. *Love Song Imitation Spanish Fly:*
1% Rufous Capsicum Annum a/k/a Red Pepper)

d. *Oriental Love Imitation Spanish Fly w/Ginseng:*

a) 26 mgs Ginseng per 4 tablets
b) 1% Rufous Capsicum Annum (a/k/a Red Pepper)

e. *Oriental Love Jungle Passion:*

a) 1% Rufous Capsicum Annum (a/k/a Red Pepper)
b) 1% Damiana a/k/a Turnera Aphrodisiaca)
c) 1% Serenoa Serrulata (a/k/a Saw Palmetto Berries)

f. *Oriental Love Turnera Aphrodisiaca:*

a) 1% Turnera Aphrodisiaca (a/k/a Damiana)
b) 1% Rufous Capsicum Annum (a/k/a Red Pepper)

g. *Drive Her Wild Oil:*

.75% Methyl Salycilate (a/k/a Artificial Oil of Wintergreen)

h. *Instant Erection Oil:*

1% Methyl Salycilate (a/k/a Artificial Oil of Wintergreen)

i. *All American Booster Caps:*

a) Vitamin A acetate 1,000 I.U.
b) Ascorbic Acid 50 mg.
c) Vitamin E 25 I.U.
d) Caffeine 25 mg.

3. I find with respect to the products of respondent Love Song Cosmetic Corp. (hereinafter "Love Song") involved in this proceeding (SONG OF PASSION TABLETS, SUPER GINSENG TABLETS, SPANISH FLY IMITATION, GINSENG AND IMITATION SPANISH FLY) that the advertisement in which they are described (Ex. C-1(c)) has a predominately sexual orientation which, taken in its totality, makes the representation that such products are effective aphrodisiacs or sexual stimulants. The various portions of the advertisement which support this general finding are as follows:

"Love Song Products—an exciting, supercharged sex life requires a full power body. For your sexual pleasure here's a fabulous new line of pleasure packed marital aids, aphrodisiacs and stimulants to turn you on and on and on!!!"

"Love Song products will intensify your love life or your money back.

"All Love Song products are unconditionally guaranteed."

4. With respect to SONG OF PASSION TABLETS I find that respondent Love Song makes the representations alleged in the complaint, based on Finding of Fact 3, *supra,* and on the following additional wording found in the portion of the advertisement relating specifically to that product:

"Guaranteed to make her hot"

"Activate, stimulate and glamorize your sex life"

"Song of Passion is a unique blend of aphrodisiacs and irritants***"

5. With respect to SUPER GINSENG TABLETS I find that respondent Love Song makes the representations alleged in the complaint based on Finding of Fact No. 3, *supra,* and on the following additional wording found in the portion of the advertisement relating specifically to that product:

"Release inhibitions—increase desire"

"The legendary root of virility"

"It has been used by the Orientals for over 5000 years to increase sexual virility and prolong life and potency."

6. With respect to SPANISH FLY IMITATION I find that respondent Love Song makes the representations alleged in the complaint based on Finding of Fact No. 3, *supra,* and on the following additional wording found in the portion of the advertisement relating specifically to that product:

"Put her in the Mood"

"The Aphrodisiac Qualities of Spanish Fly Are Legendary"

"Upon passage thru the body tiny particles of this genuine imported spice effectively and safely stimulate the sexual organs in both the male and female and has the potential to produce real excitement. Folklore has it that Don Juan has used the ingredients in these capsules to help him gain his legendary reputation as a super stud."

7. With respect to GINSENG AND IMITATION SPANISH FLY I find that respondent Love Song makes the representations alleged in the complaint based on Finding of Fact No. 3, *supra,* and the following additional wording found in the portion of the advertisment relating specifically to that product:

"Guaranteed to make her hot"

"Do you measure up? You can. Unbelievable in their effect"

"The Chinese have used it as an aphrodisiac for over 5000 years."

"Ginseng is sometimes called 'The Turn-on Root'"

"To quote S. Steingold '***if you think you have been turned on before you ain't seen nothing yet.' Try our Ginseng with Spanish Fly Capsules and find out what he means"

8. I find with respect to the products of respondent, Original Cosmetics Products, Inc., (hereinafter "Original Cosmetics") involved in this proceeding (JUNGLE PASSION CAPS, ALL AMERICAN BOOSTER CAPS WITH VITAMIN E, AUTHENTIC TURNERA APHRODISIACA CAPS, DRIVE HER WILD OIL or CREAM, and INSTANT ERECTION OIL) that the advertisement in which they are described (Ex. C-1(b), R-1) has

a predominantly sexual orientation which, taken in its totality, makes the representation that such products are effective aphrodisiacs or sexual stimulants. The various portions of the advertisement which support this general finding are as follows:

"Exciting New Items for a More Able and Desirable You"

"More Legendary Aphrodisiacs With the Placebo Qualities Doctors Have Used for Years"

9. With respect to JUNGLE PASSION CAPS, I find that respondent Original Cosmetics makes the representations alleged in the complaint based on Finding of Fact No. 8, *supra,* and the following additional wording found in the portion of the advertisement relating to that product:

"* * * designed to bring out the 'Beast in You.' Students of aphrodisiacs could write volumes about this product. Try it and write your own testimonial."

10. With respect to ALL AMERICAN BOOSTER TABS WITH VITAMIN E, I find that respondent Original Cosmetics makes the representations alleged in the complaint based on Fnding of Fact No. 8, *supra,* and the following additional wording found in the portion of the advertisement relating to that product:

"It is combined with a general cerebral and body stimulant so that it will work even better than our old formula to do the job you want it to. If you are suffering from a lack of any of the above vitamins or are just feeling tired and sluggish when you should be roaring like a lion—this product may be just for you."

11. With respect to AUTHENTIC TURNERA APHRODISIACA CAPS, I find that respondent Original Cosmetics makes the representations alleged in the complaint based on Finding of Fact No. 8, *supra,* and the following additional wording found in the portion of the advertisement relating to that product:

> "* * * designed to react upon the body in approximately 1 hour. The name Turnera Aphrodisiaca stands on its own."

12. With respect to DRIVE HER WILD oil or cream, I find that respondent Original Cosmetics makes the representations alleged in the complaint based on Finding of Fact No. 8, *supra,* and the following additional wording found in the portion of the advertisement relating to that product:

> "An amazing environmental sensitizer * * *"
>
> "This new and amazing product is for women who are having sexual relations and not getting the utmost enjoyment that sex can give you. It will also help those who are contemplating sexual relations but are too frigid to try."

13. With respect to INSTANT ERECTION OIL, I find that respondent Original Cosmetics makes the representations alleged in the complaint based on Finding of Fact No. 8, *supra,* and the following additional wording found in the portion of the advertisement relating to that product:

> "Instant Erection Oil is scientifically formulated to help you get an instant erection when rubbed on the head of the penis * * *. Not only should it give an instant erection, it should cause the penis to get harder and larger for a prolonged period of time * * * this new and amazing product is for men who have tried everything else and have had no luck. No longer need you let the best of joys that life has to offer pass you by. With this fantastic product you too can now stand up and be counted."

14. Complainant relied on the testimony of Robert S. Hotchkiss, M.D., to support its allegations of misrepresentations. Dr. Hotchkiss possessed outstanding qualifications to testify in this proceeding (Ex. C-6, *Curriculum vitae*) being a specialist in urology and since 1949, Professor and Chairman, Department of Urology, New York University School of Medicine and Postgraduate Medical School. Urology is that branch of surgery and medicine dealing with conditions of the genitourinary tract.

Dr. Hotchkiss has discussed matters relating to sexuality with other urologists, instructs first and second year medical students on sexual relations in terms of sexual adjustment and correction of difficulties such as impotence and frigidity, and keeps abreast of current literature and developments in the fields of sex and sexuality (Tr. 51).

According to Dr. Hothkiss, the great majority of sexual complaints and problems are psychogenic, rather than organic, in origin (Tr. 21, 22, 23). The only substances considered by Dr. Hotchkiss to constitute effective aphrodisiacs, or sexual stimulants, are testosterone, for males suffering from an insufficiency of male hormones, and drugs used for the treatment of thyroid conditions which may inhibit sexual performance and capacity (Tr. 24). Dr. Hotchkiss, with all his experience in the field of sexual problems, knew of no aphrodisiac for persons whose impotence or other sexual problems, are not organically caused (Tr. 25).

15. It was Dr. Hotchkiss' opinion that the products involved in this proceeding do not have the efficacies represented in the advertisements as alleged in the complaint. Acording to Dr. Hotchkiss, the only ingredients contained

in any of the products which have a generally recognized medical or therapeutic value are the methyl salicylate (oil of wintergreen) found in DRIVE HER WILD CREAM and INSTANT ERECTION OIL, and vitamins A and C and caffeine, present in ALL AMERICAN BOOSTER TABS. Ingestion of the vitamins could have a stimulating effect on the sexual virility and performance of a person with a clinically demonstrable deficiency of such vitamins. In the absence of such a deficiency they would have no such effect (Tr. 45). In the opinion of Dr. Hotchkiss, the vitamins will not have an aphrodisiac effect (Tr. 76). Methyl salicylate is used in medical practice in the treatment of sore joints or muscles. None of the products, in his opinion, constitute effective aphrodisiacs, sexual stimulants, or valid products to increase sexual performance, capacity, or enjoyment. With respect to DRIVE HER WILD OIL and INSTANT ERECTION CREAM, Dr. Hotchkiss was of the opinion that the recommended method of application, but not the ingredients themselves might produce sexual stimulation (Tr. 80, 81, 84, 86, 87).

16. Dr. Hotchkiss expressed the opinion that the knowledge of a person that he is ingesting a placebo (a substance with no medicinal value) would destroy the real purpose of the placebo, which is a favorable psychological reaction to the substance (Tr. 108, 109).

17. Dr. Hotchkiss admitted a degree of bias against the drugs involved in this proceeding as worthless for the purposes represented by respondents and in being "pushed on the public who is paying for them," but attempted to balance such bias with honest answers to the questions put to him (Tr. 117, 118).

18. I find that the opinions expressed by Dr. Hotchkiss with regard to the matters at issue in this proceeding coincide with the consensus of informed medical and scientific opinion in the field of urology (Tr. 51, 52).

19. Dr. Joseph Edward Davis, a well-qualified urologist, testified for respondent. The net of Dr. Davis' testimony with respect to the various products involved was that he could not state that they were misrepresented in respondents' advertising because he lacked knowledge, based on scientific evidence, as to whether the products would produce the results represented (Tr. 41-43). Dr. Davis does not knowingly give placebos to patients in his practice (Tr. 33) and, the same as Dr. Hotchkiss, has never prescribed any of the products involved in this proceeding to increase sexuality, and does not know any doctors who use the substances involved (Tr. 40, 41, 101).

CONCLUSION OF LAW

1. Respondents are engaged in a scheme or device for obtaining money or property through the mails by means of false representations within the meaning of 39 U.S.C. §3005.

2. I reach the foregoing conclusion in spite of the wording respondents employ in their advertisements, such as "legendary aphrodisiacs" and "placebo qualities", which might alert the buying public to the lack of efficacy of these products were it to study carefully and weigh each such word. But as the Court said in *Cates* v. *Hederlein,* 189 F. 2d 369 at p. 373:

> "The buying public does not ordinarily carefully study or weigh each word in an advertisement and the ultimate impression upon the mind of the reader arises not only from what is said but also all of that which is reasonably implied. Aronberg v. Federal

Trade Commission, 7 Cir., 132 F. 2d 165, 167. The important criterion is the net impression which the advertisement is likely to make upon the purchasers to whom the advertsement is directed. Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 2 Cir., 143 F. 2d 676, 680. It has been held that even if an advertisement is so worded as not to make an express misrepresentation, nevertheless if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable. Durland v. United States, 161 U.S. 306, 313, 16 S. Ct. 508, 40 L.Ed. 709; McCarthy v. United States, 2 Cir., 187 F. 117."

3. Respondents advertisements make the materially false representations found above and will be so understood by the average reader. See *Donaldson* v. *Read Magazine,* 333 U.S. 178, 179 (1948).

4. Respondents' argument that complainant was required to prove the alleged lack of efficacy of the products involved and to support its expert medical testimony by experimentation or testing is not well taken. The general medical and pharmacological knowledge of complainant's medical witness was a sufficient basis for his expert medical opinion. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Com'n,* 143 F. 2d 676, 678, 679. See also *Research Laboratories* v. *United States,* 167 F. 2d 410, 416, 417; *Skinny Suit,* P.S. Docket No. 3/44, Postal Service Decision, February 19, 1976; *Rogers Laboratories, Inc.,* P.S. Docket No. 4/123, Postal Service Decision, April 14, 1976; *Schiffahrts Laboratories,* P.S. Docket No. 3/193, Initial Decision, April 26, 1976.

5. The opinions expressed by complainant's expert as to lack of efficacy of these products were not substantially

controverted by those of respondent's medical expert whose testimony amounted to profession of a lack of knowledge as to what, if any, efficacy these products might have as aphrodisiacs or sexual stimulants.

6. The proposed findings of fact and conclusions of law submitted by the parties have been considered and adopted to the extent indicated. Otherwise, they are denied because they are not supported by the evidence, are contrary to the evidence, or because they are irrelevant or immaterial to the decision.

7. Accordingly, an order pursuant to 39 U.S.C. §3005 in the form attached should be issued against respondents.

QUENTIN E. GRANT
Quentin E. Grant
Administrative Law Judge

(SEAL)

JUDICIAL OFFICER
WASHINGTON, DC 20260

ORDER NO. DATE:

TO THE POSTMASTER AT New York, New York 10001

Satisfactory evidence has been presented to the Postal Service in the case identified below by docket number that ORIGINAL COSMETIC PRODUCTS, INC., P.O. Box 480; LOVE SONG COSMETIC CORP., P.O. Box F; LOVE SONG COSMETICS, P.O. Box 498 Cooper Station, all at New York, New York

and their agents and representatives (hereinafter the "Respondent") are engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S. Code 3005 (formerly 39 U.S.C. 4005) with respect to the following products: LOVE SONG SONG OF PASSION TABLETS; LOVE SONG SUPER GINSENG; LOVE SONG IMITATION SPANISH FLY; ORIENTAL LOVE IMITATION SPANISH FLY W/GINSENG; ORIENTAL LOVE JUNGLE PASSION; ORIGINAL LOVE TURNERA APHRODISIACA; DRIVE HER WILD OIL; INSTANT ERECTION OIL; ALL AMERICAN BOOSTER CAPS.

Now, therefore, pursuant to authority vested in the United States Postal Service, and by it delegated to me, I hereby forbid your payment of any Postal Money Order drawn to the order of the Respondent unless you are satisfied that such order does not relate to the above described activities. Further, you are directed to inform the remitter of any Postal Money Order, the payment of which is forbidden by this Order, that the amount thereof will be refunded upon presentation to you of the original order or a duplicate thereof issued by the Postal Service.

You are further directed to hold for not less than 48 hours (exclusive of days during which your office is not open to the public) all mail addressed to the Respondent, whether registered or not, except for any mail, which you determine, by reference to the face of its wrapper, is unrelated to the above described activities. During the 48 hour retention period Respondent shall be permitted to examine the retained mail in your presence or the presence of a postal employee designated by you and to receive any mail which (1) is not connected with the above described activities, or (2) is mail requesting a refund or representing a return of merchandise connected with such activities.

Following such examination by Respondent or the passage of 48 hours, you are directed to write plainly or stamp the words *"Return To Sender; Order Issued Against Addressee For Violation of False Representation Law"* upon the outside of all mail which the Respondent was not permitted to receive and to return such mail to the post offices from which it was mailed for return to the senders. If the outside of the mail fails to contain information necessary to permit return to the sender, the mail shall be disposed of under the postal regulations applicable to undeliverable matter.

PS Docket No. 4/120; G.C. 237-75-F

.....

Judicial Officer

APPENDIX D

Opinion and Order of Judicial Officer.

SEAL

JUDICIAL OFFICER
Washington, DC 20260

P.S. Docket No. 4/120

In the Matter of the Complaint Against

ORIGINAL COSMETIC PRODUCTS, INC.
P. O. Box 480
and
LOVE SONG COSMETIC CORP.
P. O. Box F
at
New York, New York 10011

and

LOVE SONG COSMETICS
P. O. Box 498 Cooper Station
at
New York, New York 10003

APPEARANCES FOR COMPLAINANT: H. Richard Hefner, Esq.
Law Department
U. S. Postal Service
Washington, D.C.

APPEARANCES FOR RESPONDENT: Herbert Monte Levy, Esq.
New York, New York

Appendix D—Opinion and Order of Judicial Officer.

POSTAL SERVICE DECISION

The Respondent identified in the caption above has taken a timely appeal to the undersigned under the provisions of 39 Code of Federal Regulations, Part 952, from the Initial Decision issued by Administrative Law Judge Quentin E. Grant, in which it is recommended that a mail stop order be issued against Respondent to protect the public against various false representations in Respondent's advertising. The case involves nine different products all found by Judge Grant to be falsely represented as effective aphrodisiacs or sexual stimulants.

Respondents' Appeal Brief takes issue with most of the findings that the alleged representations were made and with all of the findings that the representations are false. Respondent also contends that it was denied due process in not being permitted to reopen the hearing for presentation of additional evidence and further that the decision violates its rights under the First Amendment to the U. S. Constitution.

Judge Grant's Initial Decision amply and logically details the basis, in each instance, for his findings that the representations alleged in the complaint are made in fact in the Respondent's advertising material. Respondent has taken each advertisement and attempted in its Brief to negate the alleged representations by offering its view of the proper interpretation to be given to the claims made. The arguments are identical to those made in the Brief filed with Judge Grant. I have carefully considered these arguments. They are, in main, spurious. Judge Grant's findings that the representations charged in the complaint, and set forth in his decision, are made by the Respondent's advertising material, are clearly correct and Respondent's exceptions to those findings are disallowed.

Respondent's exceptions to Judge Grant's findings of material falsity are premised upon what it considers fatal deficiencies in Complainant's proof, attacking principally the competency and credibility of the testimony of Complainant's expert medical witness, Dr. Robert S. Hotchkiss. Both points were raised to Judge Grant who found Dr. Hotchkiss eminently qualified to express the consensus of informed medical and scientific opinion and fully credible in his testimony regarding the issues here involved. My review of the record satisfies me that Judge Grant was correct in this judgment. Respondent's arguments with respect to inconsistencies in testimony and bias are not persuasive in the light of the full testimony. The essence of Respondent's position on the proof is, to summarize the position of its medical expert, Dr. Joseph Edward Davis, that to prove a particular item is not an effective aphrodisiac or sexual stimulant, controlled and expensive experimentation would be necessary over a long period of time, perhaps five to ten years (Tr. 45).

Respondent argues that *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94 (1914), controls in this situation. That case involved the business of teaching the practical science of healing through the exercise of the human mind rather than medicines. It held that there could be found no intent to defraud the public, an element then required, but now excised from the postal false representation law, when there were two prevailing schools of respectable thought on the subject. Commingled with Respondent's contention of prerequisite testing, put amply to rest by the cases cited by Judge Grant in his conclusion of law number 4, and its contention of the "placebo" effect of its products, the argument is seen to be all form and no substance. Nor does Respondent's money-back guarantee make all things whole. See *Howard* v. *Cassidy,* 162 F.Supp. 568 (E.D.N.Y. 1958), and cases cited therein. See also *Iso-Tensor,* P.S. Docket No. 3/30 (1975).

The contention regarding the "placebo" effect merits some comment, however, if for no other reason than that Respondent urges it was a denial of due process for Judge Grant not to reopen the hearing to take additional evidence on that subject. The record in this case shows Respondent was given every opportunity for a full and fair hearing including a number of extensions the effect of which necessarily has prolonged the ultimate decision. Its request to reopen the hearing, made at the time briefs were filed with Judge Grant some seven weeks after the hearing, was to present testimony with respect to the effectiveness of "placebos." Even if it be assumed that Respondent's further evidence would show that with respect to placebo qualities the stronger the representation as to the powers of the item, the stronger will the placebo effect be, there is inherent in the entire argument the existence of false representations. From the fact that a doctor may treat a patient with a placebo, where medically indicated, and attain results therefrom it does not follow that a commercial enterprise may sell a product on the basis of false claims of its effectiveness and justify the practice on the theory that the customer may conceivably thereby overcome a possible psychological obstacle. The tool is deception and deception for profit. This the postal false representation law prohibits. The request to reopen was properly denied and Respondent's exception to that denial is disallowed.

Respondent's First Amendment contention relies upon *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* —— U.S. ——, 446 LW 4686, decided May 24, 1976. That case, however, is no help to Respondent who contends it should be read to protect "deceptive or misleading" advertising as distinguished from "false" advertising citing page 4693 of the Court's opinion to the effect that "Untruthful speech, commercial or otherwise, has never been protected for its own sake * * *. Obviously

much commercial speech is not provably false or even wholly false, but only deceptive or misleading." The very next sentences of the Supreme Court opinion, omitted in Respondent's Brief, state "We foresee no obstacle to a State dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely." The footnote referenced above goes into greater and equally lucid detail which makes it crystal clear that deceptive commercial advertising cannot seek effective cover under the First Amendment. It is quoted in full here:

> "24. In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does 'no more than propose a commercial transaction' *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. at 385 and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth if commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. Compare *New York Times Co.* v. *Sullivan, supra, with Dun & Bradstreet, Inc.* v. *Grove, supra.* They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive. Compare *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), with *Banzhaf* v. *FCC,* 132 U.S. App. D. C. 14. 405 F. 2d 1082 (1968), cert. denied, *sub nom. Tobacco Institute, Inc.* v. *FCC,* 396 U.S. 842 (1969). Compare *United States* v. *95 Barrels of Vinegar,* 265 U.S. 438, 443 (1924) ('It is not difficult to choose statements, designs and devices which will not deceive.') They may also make inapplicable the prohibition against prior restraints. Compare *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), with *Donaldson* v. *Read Magazine,* 333 U.S. 178, 189-191 (1948); *FTC* v. *Standard Education Society,* 302 U.S. 112 (1937); *E. F. Drew & Co.* v. *FTC,* 235 F.2d 735, 739-740 (CA2 1956), cert. denied, 352 U.S. 969 (1957)."

Likewise Respondent in an effort to raise its advertising claims to constitutional stature quotes Mr. Justice Stewart's concurring opinion out of context to the effect that—

> "* * * But since it is a cardinal principle of the First Amendment that 'government has no power to restrict expression, because of its message, its ideas, its subject matter, or its content,' the Court's decision calls into immediate question the constitutional legitimacy of every state and federal law regulating false or deceptive advertising."

Mr. Justice Stewart's very next sentence reads "I write separately to explain why I think today's decision does not preclude such governmental regulation." In fact, Mr. Justice Stewart goes on to state at pages 4694-5:

> "The principles recognized in the libel decisions suggest that government may take broader action to protect the public from injury produced by false or deceptive price or product advertising than from harm caused by defamation. In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction 'some falsehood in order to protect speech that matters.'"

CONCLUSION

All of Respondent's exceptions to the Initial Decision are found without merit and must be disallowed. The Initial Decision is accordingly hereby affirmed and a remedial mail stop order under 39 U.S.C. § 3005 is being issued contemporaneously with this decision.

EDWARD F. LUSSIER
Edward F. Lussier
Judicial Officer

JUDICIAL OFFICER
WASHINGTON, DC 20260

ORDER No. 76-70 Date: August 23, 1976

TO THE POSTMASTER AT NEW YORK, NEW YORK 10001

Satisfactory evidence has been presented to the Postal Service in the case identified below by docket number that ORIGINAL COSMETIC PRODUCTS, INC. at P. O. Box 480, New York, NY 10011; LOVE SONG COSMETIC CORP. at P. O. Box F, New York, NY 10011; and LOVE SONG COSMETICS at P. O. Box 498 Cooper Station, New York, NY 10003 and their agents and representatives (hereinafter the "Respondent") are engaged in conducting a scheme or device for obtaining money or property through the mails by means of false representations in violation of 39 U.S. Code 3005 (formerly 39 U.S.C. 4005) with respects to the sale of products called:

Song of Passion Tablets, Super Ginseng Tablets, Spanish Fly Imitation, Ginseng and Imitation Spanish Fly, Jungle Passion Caps, All American Booster Caps with Vit. E, Authentic Turnera Aphrodisiaca Caps, Drive Her Wild, Instant Erection Oil.

Now, therefore, pursuant to authority vested in the United States Postal Service, and by it delegated to me, I hereby forbid your payment of any Postal Money Order drawn to the order of the Respondent unless you are satisfied that such order does not relate to the above described activities. Further, you are directed to inform the remitter of any Postal Money Order, the payment of which is forbidden by this Order, that the amount thereof will be refunded upon presentation to you of the original order or a duplicate thereof issued by the Postal Service.

You are further directed to hold for not less than 48 hours (exclusive of days during which your office is not

open to the public) all mail addressed to the Respondent, whether resigstered or not, except for any mail, which you determine, by reference to the face of its wrapper, is unrelated to the above described activities. During the 48 hqur retention period Respondent shall be permitted to examine the retained mail in your presence or the presence of a postal employee designated by you and to receive any mail which (1) is not connected with the above described activities, or (2) is mail requesting a refund or representing a return of merchandise connected wtih such activities.

Following such examination by Respondent or the passage of 48 hours, you are directed to write plainly or stamp the words *"Return To Sender; Order Issued Against Addressee For Violation of False Representation Law"* upon the outside of all mail which the Respondent was not permitted to receive and to return such mail to the post offices from which it was mailed for return to the senders. If the outside of the mail fails to contain information necessary to permit return to the sender, the mail shall be disposed of under the postal regulations applicable to undeliverable matter.

PS Docket No. 4/120; G.C. 237-75-F

EDWARD F. LUSSIER
Edward F. Lussier
Judicial Officer

(SEAL)

JUDICIAL OFFICER
WASHINGTON, DC 20260

ORDER No. 76-70 (Supplement) Date: August 25, 1976

TO THE POSTMASTER AT NEW YORK, NEW YORK 10001

On August 23, 1976, Order No. 76-70 was issued which prohibited the delivery of mail to, and the payment of money orders made out in favor of, ORIGINAL COSMETIC PRODUCTS, INC. at P.O. Box 480, New York, NY 10011; LOVE SONG COSMETIC CORP. at P.O. Box F, New York, NY 10011; and LOVE SONG COSMETICS at P.O. Box 498 Cooper Station, New York, NY 10003, and their agents and representatives if such mail related to the sale of products called:

Song of Passion Tablets	All American Booster Caps with Vit. E
Super Ginseng Tablets	Authentic Turnera Aphrodisiaca Caps
Spanish Fly Imitation	Drive Her Wild
Ginseng and Imitation Spanish Fly	Instant Erection Oil
Jungle Passion Caps	

Counsel for the above-named Respondents has indicated that within two weeks from the date of this Order he will seek an injunction restraining the Postal Service from the enforcement of Order No. 76-70. If the petition for injunction is not filed on or before September 8, 1976, Order No. 76-70 shall remain in full force and effect. If the petition for injunction is filed on or before September 8, 1976, mail addressed to the above-named Respondents will be treated as follows:

(1) Mail containing orders for products other than those listed above will be delivered to the Respondents, their agents or representatives;

(2) Mail addressed to the above-named Respondents containing orders only for the products listed

above is to be withheld in the post office and not delivered to the Respondents, their agents or representatives;

(3) Mail addressed to the above-named Respondents containing orders for products not named above and one or more products that are named above will be delivered to the Respondents, their agents or representatives if, and only if, the Respondents (a) purchase a money order in the amount of the cost of the above-listed product or products ordered and (b) mail the money order to the customer by whom the order was placed.

This order will remain in force unless and until it is modified by the Judicial Officer or by the order of a court of competent jurisdiction.

(Signed) William A. Duvall
WILLIAM A. DUVALL
Acting Judicial Officer

PS Docket No. 4/120; G.C. 237-75-F

SEAL

JUDICIAL OFFICER
WASHINGTON, DC 20260

September 8, 1976
P.S. Docket No. 4/120

In the Matter of the Complaint Against

ORIGINAL COSMETIC PRODUCTS, INC.
P. O. Box 480
and
LOVE SONG COSMETIC CORP.
P. O. Box F
at
New York, New York 10011

and

LOVE SONG COSMETICS
P. O. Box 498 Cooper Station
at
New York, New York 10003

ORDER

The supplement dated August 25, 1976, to Order No. 76-70 granted Respondent until September 8, 1976, in which to file a petition for injunction after which certain action as specified therein will be taken. The supplement is hereby amended to extend the time from September 8, 1976, until September 15, 1976.

(Signed) Edward F. Lussier
Edward F. Lussier
Judicial Officer

Appendix D—Opinion and Order of Judicial Officer.

SEAL

JUDICIAL OFFICER
WASHINGTON, DC 20260

September 24, 1976

P.S. Docket No. 4/120

In the Matter of the Complaint Against
ORIGINAL COSMETIC PRODUCTS, INC.
P. O. Box 480
and
LOVE SONG COSMETIC CORP.
P. O. Box F
at
New York, New York 10011
and
LOVE SONG COSMETICS
P. O. Box 498 Cooper Station
at
New York, New York 10003

ORDER

Counsel for Respondent in the above-entitled case has formerly advised that a petition for an injunction has been filed in the United States District Court for the Southern District of New York on September 15, 1976, under Index No. 76 Civ. 4111.

Accordingly, the procedure set forth in the Supplement dated August 25, 1976, to mail stop order No. 76-70 is hereby placed into effect until modified by the undersigned or by an order of a court of competent jurisdiction.

(Signed) Edward F. Lussier
Edward F. Lussier
Judicial Officer

APPENDIX E

Magistrate's Recommendation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ. 4111 (GLG)

ORIGINAL COSMETIC PRODUCTS, INC.
and LOVE SONG COSMETIC CORP.,
Plaintiffs,

—against—

JOHN STRACHAN, Postmaster at
New York City, New York, and
UNITED STATES POSTAL SERVICE,
Defendants.

By order of the Honorable Gerard L. Goettel, District Judge, this case was referred to the undersigned to review the administrative record on cross motions for summary judgment, Rule 56, Fed. R. Civ. P., which seek review of a U.S. Postal Service ("Stop-Mail") Order issued pursuant to 28 U.S.C. §1339.

An administrative decision of the U.S. Postal Service found that the plaintiffs have been engaged in a scheme to obtain money through the mails by means of false representations in violation of 39 U.S.C. §3005[1] with respect to the sale of the following products:

[1] 39 U.S.C. § 3005 provides, pertinently:

[False representations; lotteries]

(footnote continued on following page)

Song of Passion Tablets, Super Ginseng Tablets, Spanish Fly Imitation, Ginseng and Imitation Spanish Fly, Jungle Passion Caps, All American Booster Caps with Vit. E, Authentic Turnera Aphrodisiaca Caps, Drive Her Wild, and Instant Erection Oil.

The Postal Service alleged the following misrepresentations:

1) Express and implied representation of Song of Passion Tablets, Spanish Fly Imitation, Jungle Passion Caps, and Authentic Turnera Aphrodisiaca Caps as effective aphrodisiacs or sexual stimulants;

2) Express and implied representation of Super Ginseng Tablets as an effective means of increasing and prolonging sexual virility and potency, and of All American Booster Tabs with Vitamin E, as an effective means of increasing sexual virility and performance;

3) Expressly and impliedly represented that Ginseng and

(footnote continued from preceding page)

(a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations. . . ., the Postal Service may issue an order which—

(1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and

(2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

(b) . . . .

Imitation Spanish Fly would effectively heighten and prolong sexual performance, capacity and enjoyment;

4) Expressly and impliedly represented that Drive Her Wild would heighten sexual enjoyment and cause frigid women to engage in sexual intercourse;

5) Expressly and impliedly represented that Instant Erection Oil would instantly and for prolonged periods of time enable a man, who was otherwise unable, to achieve an erection.

As a result of this decision an order was issued pursuant to 39 U.S.C. §3005 prohibiting delivery of mail to, and payment of Postal Service money orders in favor of, plaintiffs if such mail relates to the sale of the named products.

Background

In November 1975, the Postal Service instituted an administrative proceeding charging that plaintiffs' advertisements for the above nine products were materially false.

The administrative hearing began on February 18, 1976, in New York City,[2] where the Postal Service introduced evidentiary exhibits and the testimony of two witnesses: Gene McHale, a postal inspector, and Robert S. Hotchkiss, M.D., head of Urology at New York University School of Medicine. Plaintiffs offered the testimony of Melvin Cooper, the president of plaintiff corporations, and Joseph Davis, M.D., head of Urology at New York Medical College.

Plaintiffs rested their case on March 19, 1976, and on May 4, 1976 applied to re-open the proceedings. The administrative law judge (ALJ) denied this motion and on

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[2] It was moved to Washington, D.C. following a grant of plaintiffs' December 17, 1975 motion for a change of venue over opposition of the Postal Service. The Washington proceeding took place on March 19, 1976.

May 28, 1976 sustained the complaint. Plaintiffs then exhausted their administrative remedies by appealing to the Judicial Officer of the Postal Service, who affirmed the decision.

Judicial Review

The questions presented are:

(I) whether there is merit to plaintiffs' contention that 39 U.S.C. § 3005 is unconstitutional;

(II) whether the administrative decision was supported by substantial evidence; and

(III) whether the Postal Service wrongly prejudiced plaintiffs' case by refusing to re-open the hearing for further evidence.

I

Plaintiffs recognize that the constitutionality of 39 U.S.C. § 3005 was upheld in *Lynch* v. *Blount*, 330 F. Supp. 689 (S.D.N.Y.), *aff'd*, 404 U.S. 1007 (1971). They contend, however, that its constitutionality was newly placed in question as a result of a 1976 decision of the United States Supreme Court, *Va. State Board of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748. They argue that *Va. State* (decided four days prior to the decision of the ALJ), which held that certain commercial advertising is protected by the First Amendment, extends to the false advertising enjoined by 39 U.S.C. § 3005.

This argument fails in that the Court in *Va. State* explicitly states that its opinion does not protect false commerical speech.

> In concluding that commercial speech, like other varieties, is protected, we of course do not hold that

> it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible.
>
> . . . .
>
> . . . Untruthful speech, commercial or otherwise, has never been protected for its own sake . *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg* v. *State Bar*, 366 U.S. 36, 49, and n. 10 (1961). Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.
> 425 U.S. at 770-72 (footnote omitted).

The Court in *Va. State* elaborates, in a footnote, on the issue of false commercial speech.

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S., at 385, and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific prod-

uct or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. (citations omitted). They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. (citations omitted). 425 U.S. at 771-72 n.24.

II

In determining the second issue, this Court notes the standard to be followed in reviewing a Postal Service decision. *See* 5 U.S.C. §§ 704, 706 (1970).

> "The power . . . may not be interfered with by the courts unless it has *exceeded its authority or is palpably wrong*, ...
>
> "And even though the court, as the original trier of the facts, might have reached a different conclusion, it may not substitute its own judgment if there is *substantial evidence to support the finding of fact made by the* [*Postal Service*]. Thus the court's power to upset a finding by the [Postal Service] that the mails are being used in furtherance of a fraudulent scheme is restricted to those instances where there is no substantial evidence reasonably to support [its] conclusion", ...

> *See also, Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026, 16 L. Ed. 2d 131 (1966) (". . . the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.") *Unique Ideas, Inc.* v. *United States Postal Service*, 416 F. Supp. 1142, 1144-45 (S.D.N.Y. 1976). (emphasis added).

This Court must decide whether there is substantial evidence that the products to which the "Stop-Mail" Order applies were in fact advertised by means of "false" representations, within the meaning of 39 U.S.C. § 3005.

A primary question is whether these products were represented as being effective aphrodisiacs or sexual stimulants. The next issue is whether, if they were so represented, this representation was false.

Plaintiffs contend that as parts of the advertisements in issue included the words "legendary aphrodisiacs", "so called aphrodisiacs" and "legendary aphrodisiacs with the placebo qualities doctors have used for years", the products were not being represented as *actual* aphrodisiacs.[3]

In reviewing the circulars in question, this Court is guided by the established legal precept that "[q]uestions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds." *Donaldson, Postmaster General* v. *Read Magazine, Inc.*, 333 U.S. 178, 189 (1948).

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[3] "Aphrodisiac" is defined in The Random House Dictionary (unabridged ed. 1967) as

1. arousing sexual desire—n.
2. an aphrodisiac agent, as a drug.

The Court is concerned with the ultimate impression upon the potential consumer "not only from the total of what is stated but also from what is reasonably implied." *N. Van Dyne Advertising Agency, Inc.* v. *United States Postal Service,* 371 F. Supp 1373, 1376 (S.D.N.Y. 1974).

The advertisements in issue convey the overall impression that the products are not merely legendary aphrodisiacs or placebos. Although isolated passages within the ads appears to mitigate the averments that the products are actually aphrodisiacs, they do not effectively dispel the general impression that the product will aid the buyer's sex life.

> It is no defense that specific isolated portions of the advertisement might have been true.
>
> "It is not each separate word or a clause here and there of an advertisement which determines its force, but the totality of its contents and the impression of the entire advertisement upon the populace . . ."
>
> "[E]ven if an advertisement is so worded as not to make an express misrepresentation, nevertheless, if it is artfully designed to mislead those responding to it, the mail fraud statutes are applicable." *Borg-Johnson Electronics, Inc.* v. *Christenberry,* 169 F. Supp. 746, 750-51 (S.D.N.Y. 1959).

An example of the artful construction of these advertisements is found in the representations concerning "JUNGLE PASSION CAPS"—"A combination of rufous capsicum annum, damiana and serenoa serrulata designed to bring out the 'Beast in You'. Students of Aphrodisiacs could write volumes about this product. . . ." The more sophisticated reader would note the less obvious language at page bottom, "All items on this sheet sold as novelties only", and page top, "More legendary aphrodisiacs with

the placebo qualities doctors have used for years". But the "Stop Mail" Statute was not designed solely for the cynical or cautious.

> In the instance of the mail fraud law, if the evidence establishes that the scheme is directed toward the gullible and the simple, the protection of the statute is not to be denied them even though they do not reach the level of the "ordinary mind." The purpose of the statute is to protect the unwary and unsuspecting as well as the knowledgeable and worldly-wise—those who are "trusting as well as the suspicious". The public includes "'that vast multitude . . . the ignorant, the unthinking and the credulous.'" The fact that informed and sophisticated persons would readily recognize, laugh off, or even be amused by, obviously false and absurd statements in an advertisement does not detract from their power to deceive the ignorant, gullible and less experienced. *Gottlieb* v. *Schaffer,* 141 F. Supp. 7, 16 (S.D.N.Y. 1956) (footnotes omitted).

Although certain portions of these advertisements seem to be of an equivocal or puffing nature,[*] the total message to the reader is that the advertised products will increase one's sexual desire and prowess. For example, in boldest type in one of the ads is the following:

> "Love Song products—an exciting supercharged sex life requires a full power body. For your sexual pleasure here's a fabulous new line of pleasure packed marital aids, aphrodisiacs and stimulants to turn you on and on and on!!!" (exh. C-1(c)).

---

[*] "This is not to say that stop orders will be upheld by the courts whenever a person has resorted to a little exaggeration or mere puffing. The false statement must be material and it must be substantial to warrant the imposition of this drastic remedy." *Lynch* v. *Blount,* 330 F. Supp. 689, 693 (S.D.N.Y. 1971), aff'd, 404 U.S. 1007 (1972).

Having concluded that substantial evidence supports the allegation that plaintiffs advertised their prdoucts as effective sexual stimulants or aphrodisiacs, one must next consider an issue which has prompted considerable historic controversy and curiosity: whether offering these products for sale as aphrodisiacs constitutes making a false representation (within the meaning of 39 U.S.C. § 3005).

Both sides offered highly qualified expert testimony on the issue of whether the ingredients in the subject products have aphrodisiac properties. One of plaintiff's arguments is that since both sides agreed (Tr. F. 117; M. 18)* that a product's effectiveness could not be determined without double blind testing, which was not done here, the "Stop-Mail" Statute was unconstitutionally applied. Dr. Davis testified that experimentation was necessary because the products might be shown to be effective sexual stimulants. (Tr. M. 10, 13, 18-22).

However, experimentation was not a *sine qua non* for a fiding by the ALJ in this case. In *Reilly* v. *Pinkus*, 338 U.S. 269, 274 (1949), it was held that the testimony of a government expert could rest on his professional knowledge. The Court there considered the contention that a prior decision, relied upon by plaintiffs here, rendered expert testimony incompetent in any case where there was a failure to test the products.

> We do not understand or accept it [the *McAnnulty*** holding] as prescribing an inexorable rule that automatically bars reliance of the fact-finding tribunal upon informed medical judgment every time medical

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* "F". refers to the February Transcript and "M". to the March Transcript.

** *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902).

> witnesses can be produced who blindly adhere to a curative technique thoroughly discredited by reliable scientific experiences. But we do accept the *McAnnulty* decision as a wholesome limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience. For in the science of medicine, as in other sciences, experimentation is the spur of progress. It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity. *Id.* at 274.

The clear reference to "new ideas" and "fields where knowledge has not yet been crystalized in the crucible of experience" renders the *McAnnulty* rationale inapplicable to this case. As the expert testimony indicated, the substances in question have been considered by medical and pharmacological texts since as early as 1907 (Tr. F.29, 30, 32-34, 71, 90, 92, 98, 101; M. 17, 31-32). The evidence indicates sufficient exploration of the sexual stimulus value of these ingredients to take it out of the area of "new ideas" contemplated by *McAnnulty* and *Reilly*.

A further reading of *Reilly* demonstrates that the postal order issued in the case at bar is justified in the face of conflicting medical testimony on the issue.

> In this case there is conflict, though slight, as to whether kelp or iodine is valueless as a weight reducer. But even if we assume that medical opinion is yet in a state of flux on this question, we think that there was sufficient evidence to support the findings that the efficacy of the "Reducing Plan" as a whole was misrepresented in respondent's advertising. And we think

those misrepresentations went beyond permissible "puffing" of a seller's wares; they were material representations on which credulous persons, eager to reduce, were entitled to rely. Despite subtle qualifying phrases it is difficult to read these advertisements as a whole without receiving the impression that, contrary to facts justifiably found by the Postmaster General, kelp is a sure and drastic weight reducer; that a user can reduce without uncomfortably restricting his usual ample diet of fattening foods; that the treatment is absolutely safe and harmless to all ages, to the ill and the well.

See *Donaldson* v. *Read Magazine*, 333 U.S. 178, 188-189. These representations, if made with intent to decieve,* fall squarely within the type which in *Leach* v. *Carlile*, 258 U.S. 138, were held to justifying findings of fraud. *Id.* at 274-75.

Notwithstanding the evidence of the exploration of the efficacy of plaintiffs' products in noted texts used by experts in the urological field, Dr. Davis testified that experimentation was necessary here because science has acquired new techniques within the last ten years which may better determine whether such products actually have any sexual value.[5]

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* It has been held that a finding of *scienter* is unnecessary for 39 U.S.C. § 3005 purposes. See *Lynch* v. *Blount*, *supra*.

[5] . . . .

Q. • • • The fact that there is no reputable scientific literature that you could find in favor of any of these products as affecting sexuality does not indicate to you that they have no value?

A. It does not indicate to me that they might still—they might still have value if appropriate studies were done that have not been done.

(footnote continued on following page)

However, although Dr. Davis' suggestion has merit, experimentation was not an absolute prerequisite to an ALJ determination in this case.

The contention seems to be that even the testimony of the most experienced medical experts can never rise above a mere "opinion" unless the expert has made actual tests of the drug to determine its effects in relation to the particular representations alleged to be false. The *McAnnulty* holding did not go so far. *Reilly, supra,* at 274.

Both physicians' opinions rested on their general professional knowledge. Dr. Hotchkiss relied on an established body of medical and pharmacological literature (*e.g.*, U.S. Dispensary, U.S. Pharmacopoeia) in concluding that plaintiffs' products were incapable of effecting the claimed re-

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(footnote continued from preceding page)

Q. By and large, these are all substances which have been with us for generations or centuries, isn't that true?

A. Yes, sir.

Q. And the matter of sexual capacity or performance has been of concern to medical science for a number of years, at least since before Freud, is that not true?

A. Yes, sir. May I elaborate on my answer to that?

JUDGE GRANT: Yes.

THE WITNESS: But it is only within the past 10 years that we are gaining information about the effects of the diurnal variations in testosterone and other chemicals which have profound effect on the sexual organs. It is only within this period of time that we are beginning to have a chemical understanding—well, not so much a chemical understanding, but an understanding of the physiologic variations in hormonal function which go on during the day and at night, in particular individuals. And, by, for example, studying agents like this, on the basis of these chemical determinations, for example, this might be a way of determining whether they work or not. I mean, we just do not know. So now science has available techniques possibly to study agents like this. (Tr. M. 49-50).

sults. The doctor's treatment of over 2,000 patients over 40 years for sexual dysfunctions contributed to his firm opinion. (Tr. F. 20, 23).

> Opinions of experts when founded upon known scientific facts are not to be considered the same as opinions of laymen, but are considered by the courts as substantive evidence. *Research Laboratories, Inc.* v. *United States,* 167 F. 2d 410, 416 (9th Cir. 1948).

Dr. Hotchkiss' reliance upon well-known medical and pharmacological texts certainly falls within the category of "known scientific facts." The ALJ was thus within his discretion in affording this testimony more weight than that afforded Dr. Davis' expert evidence.

Dr. Hotchkiss testified that none of the ingredients in plaintiffs' products were, as marketed,[6] in and of themselves,[7] effective sexual stimulants, (passiflora, rufous capsicum annum Tr. F. 25-26, 31-32; ginseng Tr. 30; damiana, serenoa serrulata Tr. 34-35; caffeine, ascorbic acid, Vitamins A and E Tr. 42-45; methyl salicylate Tr. 47-50). He noted that there was no valuable aphrodisiac for patients without organically caused sexual problems (Tr. F. 25); that the ingredients in the products at issue were not used in the medical profession[8] (Tr.F. 25-27); that the 1907 edition of the U.S. Dispensary, 19th ed., stated that ginseng pasnas was not employed as a medicine here and the 1974 edition stated that it was rarely so employed; that the 1973 U.S. Dispensary and British Pharmacopoeia deleted all reference to ginseng (Tr.F. 29-30); that Ginseng and Imitation Spanish Fly (red pepper) had no effect on sexual activity (Tr.F. 32); that the damiana in Jungle Passion Caps (red pepper, damiana, serenoa serrulata)

[6] Dr. Hotchkiss testified that although caffeine was a stimulant, the dosage in All American Booster Caps was too weak to effect any sexual stimulus (Tr. F. 44, 78). Plaintiffs contend that Dr. Hotchkiss failed to recognize that the recommended dosage was 3 pills daily, which they contend, and Dr. Davis indicated, would have a stimulating effect. While this Court recognizes that there is some merit to plaintiffs' argument, in *Leach* v. *Carlile,* 258 U.S. 138, the Court held that a difference of opinion as to whether a product had any value at all did not bar a stop-mail order based on claims of far greater curative powers than the product could actually have. See *Reilly, supra,* at 273. Certainly plaintiffs' ad for the caffeine—containing product bespeaks far greater sexual stimulus value than it could actually have, based on Dr. Hotchkiss' testimony.

[7] Dr. Hotchkiss testified that application of the methyl salicylate in Drive Her Wild Cream and Instant Erection Oil would probably induce some sexual excitement, but as a result of the tactile sensation rather than its inherent potency. (Tr. F. 79-90).

As for Vitamins C, A and E, Dr. Hotchkiss indicated that one suffering from a deficiency of these vitamins might be incidentally helped in his sex life (Tr. F. 45, 76-77). However, Dr. Hotchkiss testified that the representations were false in that they purported to sell aphrodisiacs for the general population, which the doctor said do not exist. (Tr. F. 118-19). Indeed, Dr. Davis testified that he has to examine individuals with "sexual incapacity" to determine whether they suffer from a physiological or organic condition before determining whether to prescribe any specific drug as an aphrodisiac. He testified that he had never prescribed any of the substances in this case to increase sexuality. (Tr. M. 28-29).

[8] Dr. Hotchkiss' expertise in the area of sexual problems is supported by the fact that he presently teaches first and second year medical students about sexuality, which requires him to remain aware of current literature on sex. The doctor said that his opinions coincided with the concensus of informed medical and scientific opinion in urology. (Tr. F. 51-52).

was deemed to be of no value except as a feeble tonic (Tr. F. 34) in the 1907 U.S. Dispensary; that the 1947 U.S. Dispensary states that there is no convincing evidence of its remedial value, it is never currently prescribed by physicians, and is now deleted from modern pharmacologies; that serenoa serrulata was deleted from the U.S. Dispensary after 1947 (Tr. F. 34-35); that passiflora was considered to be of doubtful value in the 1907 U.S. Dispensary; that the 1907 U.S. Dispensary states that definite knowledge of the nature of its active principle is lacking (Tr.F. 90-92); and that the 1975 ed. of the U.S. Pharmacopoeia doesn't list passiflora at all.

Although Dr. Davis testified that the products might well have an aphrodisiac effect because, for example, some irritated the urinary tract (Tr. M. 7, 17), he relied on scant textual evidence (Tr. M. 15-17, 32). His testimony indicated that he did not know whether many of the representations were medically true or false (Tr. M. 11) and that experimentation may have been enlightening. (Tr. M. 17-18, 22, 49). Had Dr. Davis indicated his reliance on treatises of a caliber of that relied on by Dr. Hotchkiss, there may have been more of a question as to whether the ALJ determination was supported by substantial evidence. Plaintiffs failed to controvert or undermine the substantial evidence supporting the ALJ decision that plaintiffs' representations were false.

III

Finally, this Court considers plaintiffs' argument that the ALJ erred in refusing to reopen the proceeding for the purpose of taking evidence on the nature of placebos and the relationship of the placebo effect on "the effectiveness of medical therapy" and to permit plaintiffs to gather re-

sults of research on ginseng discussed in the April 25, 1976 New York Times Magazine.

The standard for reviewing this decision was recently stated by this Circuit.

> [A]n agency's refusal to reopen the record cannot be deemed arbitrary and capricious unless the new evidence offered, if true, would clearly mandate a change in result, ...

Greene County Planning Board v. *FPC*, 559 F.2d 1227, 1233, (2d Cir. 1976), *en banced on other grounds*, 565 F.2d 807 (2d Cir. 1977).

In this case, it is clear that evidence of a placebo effect of these products would not have altered the outcome of the hearing. Defendants correctly contend that if products are represented as causing a physical reaction when used, and this representation is false, the fact that they incidentally have a favorable psychological effect does not vitiate the falseness of the representations.

Were the courts to protect false advertising because some, or even many, customers benefited from the belief that worthless drugs were improving their sexual situation, 39 U.S.C. § 3005 would be rendered ineffective. It has indeed been documented that just as one's state of mind may create body illness, so may it be a cure for physical ailments.[9]

The use of placebos, if at all, should be properly confined to the province of skilled medical personnel who have examined the troubled individual, asertained that his problem is not physiological, and determined that a placebo may be of aid. In fact, an article offered by plaintiffs

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[9] *See, e.g.*, "Potent Non—Drugs—Placebos Are Harmless, But they Work", Wall St. Journal. Aug. 25, 1977, at 1, col. 1 (annexed to plaintiffs' supplemental affidavit, 10/21/77).

regarding placebos suggests the ethical problems of physicians in prescribing placebos.

> For many doctors, deliberate use of a placebo to treat a patient involves an ethical problem. The placebo will work only if the physician lies to the patient. Indeed, studies have shown that the more conviction he can muster in his deception the more effective the placebo. "Potent Non-Drugs . . . . ". *supra.*

Thus, the failure to reopen the hearing to take evidence on the placebo issue did not constitute a violation of due process.

> The requirements of due process mandate that an administrative hearing will constitute "a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law. (citations omitted). Although an ALJ has wide latitude in the conduct of a hearing, . . . , "administrative convenience or even necessity cannot override the constitutional requirements of due process." (citations omitted). *Lloyd Carr & Co., et al* v. *Commodity Futures Trading Comm'n,* 77-4146, slip op. at 821 (2d Cir. Dec. 30, 1977).

It is therefore respectfully recommended that defendant's motion for summary judgment be granted.

The foregoing shall constitute my findings on this matter.

Respectfully submitted,

SOL SCHREIBER
Sol Schreiber
United States Magistrate

DATED: New York, New York
April 25, 1978

No. 79-157

In the Supreme Court of the United States

OCTOBER TERM, 1978

ORIGINAL COSMETICS PRODUCTS, INC., AND LOVE SONG COSMETICS CORP., PETITIONERS

v.

JOHN STRACHAN, POSTMASTER AT NEW YORK CITY, NEW YORK, AND UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not reported. The opinion of the district court (Pet. App. 6a-10a) is reported at 459 F. Supp. 496.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1979. The petition for a writ of certiorari was filed on Monday, July 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment permits application of the substantial evidence standard in judicial review of administrative determinations under 39 U.S.C. 3005.

2. Whether the United States Postal Service had substantial evidence to conclude that petitioners engaged in a scheme for obtaining money through the mails by means of false representations.

3. Whether procedures under 39 U.S.C. 3005 for the prevention of false advertising through the mails are constitutional.

STATEMENT

1. In November 1975, the United States Postal Service commenced an administrative proceeding against petitioners under 39 U.S.C. 3005.[1] The Postal Service complaint charged that petitioners had advertised nine products variously as aphrodisiacs and sexual stimulants in a materially false manner (Pet. App. 12a-14a). An administrative hearing was held on February 18, 1976. The Postal Service introduced testimony in support of the charges from a postal inspector and from a urologist at

[1] 39 U.S.C. 3005 provides in pertinent part:

> (a) Upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations * * *, the Postal Service may issue an order which—
>
> > (1) directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of this section, if the person, or his representative, is first notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns the mail to the sender; and
> >
> > (2) forbids the payment by a postmaster to the person or his representative of any money order or postal note drawn to the order of either and provides for the return to the remitter of the sum named in the money order or postal note.

New York University School of Medicine. Petitioners offered contrary testimony from their corporate president and from a urologist at New York Medical College (*id.* at 21a-23a, 43a). The administrative law judge sustained the complaint (*id.* 11a-27a, at 43a-44a).

Petitioners appealed this decision to a judicial officer of the Postal Service. The judicial officer sustained the decision and issued a remedial order to the postmaster at New York, New York, pursuant to 39 U.S.C. 3005 (Pet. App. 28a-36a). The order prohibited the payment of Postal Service money orders for the nine products in issue and directed the return of all mail addressed to petitioners that related to the deceptive scheme. The postmaster was directed to determine the relationship of mail to the scheme "by reference to the face of its wrapper" (*id.* at 36a). The order also required the postmaster to hold petitioners' mail for at least 48 hours to permit petitioners to examine the retained mail in the presence of the postmaster or a designated Postal Service employee and to release any mail (a) not connected with the scheme or (b) requesting a refund or returning merchandise connected with the scheme (*id.* at 35a-36a).

A supplemental order of August 25, 1976, modified the remedial order by directing that mail addressed to petitioners that is related to the deceptive scheme be detained by the postmaster rather than returned to the sender. The order provided that mail containing orders for products in addition to those that had been advertised deceptively was to be delivered to petitioners on the condition that they reimburse the customer for any orders for the nine products that were advertised deceptively (Pet. App. 37a-38a).

2. The district court, acting on the recommendation of the United States Magistrate (Pet. App. 41a-58a), upheld

the administrative determination and order (*id.* at 6a-10a). The court of appeals affirmed (*id.* at 1a-5a). The court of appeals held that 39 U.S.C. 3005 is constitutional, noting that "untruthful speech" is not protected by the First Amendment (Pet. App. 2a-3a). The court also determined that the record contained substantial evidence from informed medical opinion to support the decision of the Postal Service that petitioners' advertising claims were false. It rejected petitioners' contention that the absence of scientific tests was fatal to the administrative decision (*id.* at 3a-5a).

ARGUMENT

1. Petitioners argue (Pet. 7-9) that the court of appeals erred by construing 39 U.S.C. 3005 to confine judicial review of stop-mail orders to a determination of whether the decision of the Postal Service is supported by substantial evidence. Petitioners maintain that application of the substantial evidence standard in this case violates the First Amendment. These contentions are insubstantial.

39 U.S.C. 3005(a) authorizes the administrative action taken in this case "[u]pon evidence satisfactory to the Postal Service." Under this statute, petitioners are entitled to judicial review only to determine whether there is substantial evidence to support the administrative decision. *Leach* v. *Carlile*, 258 U.S. 138, 139-140 (1922); *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 96 F. 2d 861, 864 (D.C. Cir.), cert. denied, 305 U.S. 624 (1938).

The application of this standard of judicial review to administrative findings of commercial fraud is not unconstitutional. The constitutionality of 39 U.S.C. 3005 is well-established. This Court has, on several occasions,

upheld Postal Service proceedings under this statute against the contention that the statute violates the First and Fifth Amendments. *Lynch* v. *Blount*, 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court), aff'd, 404 U.S. 1007 (1972); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904). In sustaining this regulatory scheme against constitutional attack in *Lynch* v. *Blount*, *supra*, the district court correctly observed that the procedural protections afforded under the Constitution to other forms of speech "are wholly inappropriate, unnecessary and inapplicable to the field of commercial fraud." 330 F. Supp. at 694.

Nothing in this Court's decisions subsequent to *Lynch* has enlarged the procedural rights of advertisers who have been charged with commercial fraud. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)—which concerned the question "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity," *id.* at 773—the Court did not suggest that the regulation of false advertising must meet the standards applicable to protected forms of speech. Indeed, the Court specifically recognized that false or misleading commercial speech is not "protected for its own sake" by the First Amendment. 425 U.S. at 771-772 & n.24.[2] The court of appeals was thus correct in

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[2]Petitioners' reliance (Pet. 8-9) on *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979), which requires proof by more than the preponderance of the evidence in civil commitment proceedings involving individual liberty, is totally misplaced. The administrative order in this case is designed solely to curtail unlawful use of the mails. It imposed no incarceration, fine or other penalty for petitioners' unlawful conduct.

concluding (Pet. App. 2a) that the substantial evidence test is not unconstitutional as applied to the review of agency fact findings involving "[g]ood old-fashioned schemes to defraud." *Lynch* v. *Blount*, *supra*, 330 F. Supp. at 695.[3]

2. Petitioners contend (Pet. 9-11) that the evidence in the record does not support the Postal Service decision. The issues presented in the administrative proceeding were (1) whether petitioners represented their products as effective aphrodisiacs or sexual stimulants and (2) if so, whether this representation was false. The first issue was concededly properly determined adversely to petitioners and is not at issue here.[4] The administrative determination on the second issue simply gave greater weight to the evidence proffered by the Postal Service than by the petitioners.

The expert witness for the Postal Service testified that none of the ingredients in petitioners' products, as marketed, is inherently effective as a sexual stimulant. This testimony was founded on acknowledged medical

[3]For example, the Postal Service observed that petitioners sold common variety red pepper as "Imitation Spanish Fly" for $5.95 per 24 tablet bottle (Pet. App. 9a).

[4]Indeed, the fact that these representations were made is clear from the face of petitioners' advertisements that are attached to the administrative complaint (Pet. App. 12a-14a). Petitioners contend (Pet. 10) that the magistrate's use of a third brochure that was not attached to the administrative complaint violates the Due Process Clause. This contention is insubstantial. Administrative pleadings are accorded liberal amendment to conform to proof. *National Realty & Construction Co.* v. *Occupational Safety and Health Review Commission*, 489 F. 2d 1257, 1264 (D.C. Cir. 1973); 1. K. Davis, *Administrative Law Treatise* § 8.04, at 523 (1958). The brochure in question was introduced in evidence at the administrative hearing without objection by petitioners (Feb. 18, 1976, Admin. Tr. 7-10).

and pharmacological texts (Pet. App. 54a-55a).[5] In contrast, petitioners offered no evidence that their products were potent or scientifically formulated. Instead, they presented expert testimony to the effect that scientific tests should be conducted to determine whether or not the products would produce the results represented (*id.* at 23a, 56a). But, as the court of appeals observed (*id.* at 4a), this Court has expressly rejected the contention that tests are necessary when, as here, there is a reputable body of medical opinion that has concluded that the representations made by the advertisement are false. *Reilly* v. *Pinkus*, 338 U.S. 269, 274 (1949).[6]

[5]The government's expert, Dr. Hotchkiss, had treated more than 2,000 patients for sexual dysfunctions (Pet. App. 54a). In addition to his medical experience, he relied upon the U.S. Dispensary and the U.S. Pharmacopeia in concluding that the materials contained in "Jungle Passion Caps" (red pepper), "Spanish Fly Imitation Tablets" (red pepper), and "All American Booster Caps" (caffeine) had little or no efficacy as a sexual stimulant (Pet. App. 53a-56a). Moreover, petitioners, in their advertisements, praised the items for "the placebo qualities" they possessed, thereby admitting their lack of intrinsic value. The magistrate was entitled to conclude (Pet. App. 48a) that, to the uninitiated, this oblique reference to the product's lack of utility was insufficient to "dispel the general impression [made by the advertisement] that the product will aid the buyer's sex life."

[6]*American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902), on which petitioners rely (Pet. 9), is inapposite. In that case, the Court held that medical opinion alone could not establish that a particular method of treatment was ineffective and its advocacy thus fraudulent. As the Court explained in *Leach* v. *Carlile*, 258 U.S. 138, 139 (1922), however, medical opinion may be relied on by itself for the purpose of demonstrating "not that the substance which appellant was selling was entirely worthless as a medicine * * * but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public." As the courts below concluded, the substances advertised by petitioners (*e.g.*, wintergreen, red pepper, caffeine) plainly were not a "panacea" for the problems to which they were addressed.

3. Petitioners' remaining constitutional arguments have no merit. Their contention (Pet. 11) that 39 U.S.C. 3005 requires the Postal Service to open petitioners' mail without a warrant is unsupported. The statute confers no such authority on the Postal Service. To the contrary, the administrative order requires the Postal Service to determine the relationship of mail to the unlawful scheme "by reference to the face of its wrapper" (Pet. App. 36a). The order requires the Postal Service to detain the mail for at least 48 hours so that petitioners may examine the mail and receive it if it is unrelated to the unlawful scheme. Any other determinations are to be made according to the "outside of the mail" (Pet. App. 36a). Petitioners do not allege that any of their mail actually has been opened by the Postal Service under the order (Pet. 11). Their contention that the statute and order violate the Fourth Amendment is thus entirely groundless.

Petitioners claim (Pet. 13) that the stop-mail order chills even truthful advertising in violation of the First Amendment. But this contention ignores the fact that the stop-mail order is limited to mail and money order activity that is related to the false representation scheme (Pet. App. 35a-38a). The power of the government to regulate untruthful commerical speech in this fashion is not subject to dispute. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc., supra.*

Petitioners also contend (Pet. 13) that the narrower remedy of a cease and desist order would be an adequate cure for false representation schemes and that the stop-mail order is therefore overly broad in violation of the

First and Fifth Amendments.[7] Petitioners' reference to overbreadth analysis is misplaced because, as is apparent from the order itself (Pet. App. 35a-38a), the order applies only to mail that is related to petitioners' unlawful activity. The stop-mail order thus regulates the same unlawful subject matter that a cease and desist order would, but it does so more effectively. It is not unconstitutional simply because it is the most effective means of curbing petitioners' unlawful conduct. The order does not interfere with or chill the exercise of lawful protected speech.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

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[7] 39 U.S.C. 3005 confers no power on the Postal Service to issue cease and desist orders.

DOJ-1979-09